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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 290

ARCHIE E. MERRIOTT, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

ARCHIE E. MERRIOTT, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Claims entered on November 15, 1963, a denial of Motion for Rehearing and For Leave to File Amended Petition entered on April 17, 1964.

OPINION BELOW

The opinion of the United States Court of Claims is reported at Fed. 2d . The Court of Claims rendered no opinion in denying petitioner's Motion for Rehearing and For Leave to File Amended Petition. The opinion of the Court of Claims is set forth in Appendix A at page .

JURISDICTION

The judgment of the United States Court of Claims was entered on November 15, 1963 (Petition for Rehearing and For Leave to File Amended Petition was denied on April 17, 1964). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

This case involves a suit by a former reserve Army officer who was released from active service for medical disability during World War II. His suit in the Court of Claims was in the alternative for disability retirement benefits or in the alternative for active duty pay. Petitioner had been released from active duty with the Army on January 1, 1945 because of permanent physical disability. He received no disability retirement pay because the Secretary of War found that his disability predated his entry on active duty. Later, upon petitioner's timely appeal to the Army Disability Review Board, the Secretary of the Army in 1960 agreed with petitioner's contention that his disability did not exist prior to his active service, but instead of granting his disability pay, also reversed the prior finding of the Secretary of War that petitioner was permanently disabled for active service when released in 1945 and reversed the Secretary of War's administrative action releasing him for permanent medical disability. After applying for relief to the Army Board for Correction of Military Records, petitioner sued in the Court of Claims in September 1961, alternatively for disability retirement benefits (on the grounds that the Secretary of the Army was correct in reversing the Secretary of War's finding that his disability predated his active duty but incor-

rect in also finding petitioner not permanently incapacitated when released in 1945) or for active duty pay (on the ground that if the Secretary of the Army was correct in finding petitioner not permanently disabled when released from active service then petitioner was never legally released from active service and entitled to active pay from 1945 until validly released). The Court of Claims granted the government's motion to dismiss the disability retirement pay claim on the ground it was barred by the six year statute of limitations and on its own motion dismissed the active duty pay claim as wholly without merit because (a) the petitioner failed to allege that he objected to being released and without such objection he waived any invalidity in the release; (b) the petitioner as a National Guard officer served at the will of the government and could be released for many reasons; and (c) petitioner had failed to show or allege that there was any reason to believe that petitioner would have been kept on active duty. On the foregoing facts the questions presented are:

1. Does the six year statute of limitations bar a suit brought in the Court of Claims by a former reserve officer for disability retirement pay which was filed more than six years after his release from service, but within one year from new findings and administrative action by the Secretary of the Army reversing the Secretary of War's prior findings and action releasing the officer for permanent disability but without retirement pay?

2. Where a reserve officer is released from active service for permanent physical disability and later the Secretary of the Army finds the officer was not permanently disabled when released, does not the Sec-

retary thereby find that the officer was erroneously released from active service entitling the officer to active duty pay from the date of his release until he is properly released?

3. Need such an officer allege in his petition in the Court of Claims claiming active duty pay from the date of his erroneous discharge that he objected to his release and that there was reason to believe that he would be retained on active duty for a material period but for his erroneous discharge?

4. Assuming for the sake of argument that he should make such allegations in his petition, was it error for the Court of Claims not to permit him to amend his petition to make the allegations?

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

Title 28 U.S.C. § 2501, reading:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereor is filed within six years after such claim first accrues.

Title 10 U.S.C. § 1552—Pertinent provisions are set forth in Appendix B at page .

Title 10 U.S.C. § 1554—Pertinent provisions are set forth in Appendix C at page .

Rule 18 of the Court of Claims Rules—Pertinent provisions are set forth in Appendix D at page .

STATEMENT OF THE CASE

On September 16, 1940, petitioner was commissioned in the National Guard of the United States and the Army of the United States with the rank of 2nd Lieutenant and entered on extended active duty. On September 19 and October 19, 1940, he was physically examined by the Army and found acceptable for active military service. In August of 1944, while still on active duty, and upon return from overseas service, petitioner was placed in an Army hospital for a study of a suspected hypertensive condition. While hospitalized he was required to appear before an Army Retiring Board, which after a hearing found petitioner to be permanently incapacitated for active service by reason of arterial hypertension but found that such incapacity originated prior to petitioner's entry on active service. On October 15, 1944 the Secretary of War notified the petitioner that the Retiring Board's findings had been approved, and on January 1, 1945 petitioner who had attained the rank of Captain was released from active duty by reason of physical disability and reverted to inactive status but without retirement pay.

On December 28, 1959, petitioner pursuant to 10 U.S.C. § 1554, filed an application for review of his case, by the Army Disability Review Board, claiming the Army Retiring Board had no evidence to support its finding that petitioner's incapacity existed prior to his entrance on active service. On October 10, 1960, after formal hearing the Army Disability Review Board reversed the finding of the Army Retiring Board that petitioner's incapacity for active service predated his entry into service and reversed the finding that petitioner was permanently incapacitated for

active service when released for that reason and reversed the action of the Secretary of War releasing petitioner for permanent disability. On October 14, 1960 petitioner was notified of the Army Disability Review Board's finding and reversal of the Secretary of War's prior action by the Adjutant General.

On November 25, 1960, pursuant to 10 U.S.C. § 1552 petitioner applied to the Army Board for Correction of Military Records for correction of his record in the alternative:

(1) to show that he was permanently incapacitated for active service when released, that the incapacity was service-connected and that he was entitled to disability retirement pay; or

(2) to reflect the finding of the Army Disability Review Board that he was not physically incapacitated when released from active duty in 1945, and therefore erroneously released from active duty and entitled to full active duty pay from January 1, 1945 until such time as he might be legally and properly released and discharged.

On June 26, 1961 petitioner was advised by the adjutant General that the Correction Board had denied his application without hearing. On September 20, 1961, petitioner filed his application in the Court of Claims claiming in the alternative disability retirement pay (on the ground that the Secretary of the Army was correct in reversing the Secretary of War's finding that his disability predated his active duty but incorrect in also finding petitioner not permanently incapacitated when released in 1945) or for active duty pay (on the ground that, if the Secretary of the Army was correct in finding petitioner not permanently disabled when released from active serv-

ice, then petitioner was never legally released from active service and entitled, therefore, to active duty pay from 1945 until validly released.)

The government moved to dismiss the petition on the ground that the claims were barred by the six year statute of limitations. On November 15, 1963 the Court granted the government's motion and dismissed the claim for active duty pay on the ground that the statute of limitations barred recovery. Upon its own motion it dismissed the alternative claim for active duty pay as wholly without merit because (a) the petitioner failed to allege that he objected to being released and without such an objection he waived any invalidity in the release; (b) the petitioner as a National Guard officer served at the will of the government and could be released for many reasons; and (c) petitioner had failed to show or allege that there was any reason to believe that he would have been kept on active duty.

On February 5, 1964 petitioner made a timely motion for rehearing and for leave to file an amended petition so as to allege that petitioner had on the record before the 1944 retiring board objected to being released and to allege reasons why it was likely that petitioner would have been kept on active duty but for his erroneous discharge. On April 17, 1964 the Court denied without opinion petitioner's motions for rehearing and to amend.

REASONS FOR GRANTING THE WRIT

1. The decision by the Court of Claims that the claim for disability retirement pay was barred by the statute of limitations is contrary to its recent decision in *Friedman* v. *United States*, Ct. Cl. No. 377-60 de-

cided Nov. 7, 1962, 310 F. 2d 381, cert. denied, 373 U.S. 932 (1963). Prior to that decision there was so much confusion on the question of the statute of limitations in relationship to military pay cases that the Court of Claims, noting the confusion, felt constrained in the *Friedman* case to write an elaborate dissertation on the question. Its opinion attempted to catalogue the variety of postures of military pay cases that reach the Court and to give some logical basis for applying or not applying the statute of limitations in each type of case. Although this Court did not grant review of the *Friedman* case, it was generally felt that *Friedman* had settled once and for all an admittedly chaotic situation.

In the *Friedman* case, it was held that a cause of action for disability retirement pay accrues only after a *final* decision or action of a competent board. It further held that a board's action is not final if there are circumstances in the case depriving the action or non-action of finality. Because the instant case involved a reversal and nullification in 1961 by the Army Disability Review Board of a decision and action of a Retiring Board in 1945, it was felt that the petitioner's cause of action for retirement pay arose upon the final decision by the Secretary in 1961 and therefore was not barred by limitations.

The Court of Claims in barring petitioners claim because of limitations has either openly disregarded the rule of *Friedman* on finality or placed a strained and unrealistic interpretation on the term "final action."

In any event the net effect of its decision in the instant case is to return much of the confusion that predated its decision in *Friedman*.

2. Of extreme importance to this Court in connection with the statute of limitations question is the relationship generally between the 15 year statute of limitations authorized by Congress within which an officer retired or released from active duty for physical disability without pay might seek review of his case by a Disability Review Board and the 6 year statute of limitations for bringing action in the Court of Claims. This relationship is closely intertwined in the instant case.

It has been held that federal appellate courts may not review the action of a Disability Review Board under the Administrative Procedure Act. *Updegraff* v. *Talbott* (C.A. Va. 1955), 221 F. 2d 342. Up until *Friedman* the Court of Claims had repeatedly held that the Court of Claims could review the action of an administrative board, department of official in military pay cases and that a cause of action arose when the board, department or official actual in an arbitrary or capricious manner. *Uhley* v. *United States*, 128 C. Cls. 608; *Capps* v. *United States*, 133 C. Cls. 811; *Furlong* v. *United States*, 138 C. Cls. 843; *Proper* v. *United States*, 139 C. Cls. 511; *San Millan, Jr.* v. *United States*, 139 C. Cls. 485; and *Eichs* v. *United States*, 145 C. Cls. 522. Under these cases a suit was in time in the Court of Claims if brought within 6 years of arbitrary action by the review board even though more than 6 years after release of the officer from the service. This seemed to be consistent with Congressional intent in enacting 10 U.S.C. § 1554 establishing the review boards and providing a 15 year period after release for review. If this were not so, there would be an opportunity if not an invitation for such Disability Review Boards and the several

Secretaries to be arbitary in cases decided subsequent to six years from discharge since favorable action or not would depend solely on their discretionary beneficence or lack of it. Stated another way, could Congress have reasonably intended no review by the Court of Claims of arbitrary action by the review boards and the Secretaries once six years had elapsed after discharge although it allowed review in the Court of Claims during the first six years after discharge?

3. The present case is a perfect example of the need for this Court to clarify Congressional intent in allowing to veterans a generous grant of 15 years within which to have their discharges without retirement pay reviewed. Here petitioner was released from active service in 1945 because of a permanent medical disability which made him fully incapacitated for further service. He was denied his retirement pay for one reason only, namely because the Retiring Board found that his disability predated his active service. Under 10 U.S.C. § 1554 petitioner had 15 years to seek review by the Army Disability Review Board. He sought review in 1959 more than six years from his release, but within the 15 year period prescribed by Congress. In 1960 the Review Board agreed with him that the Retiring Board was in error in finding that his disability predated his entry into service and reversed that finding. This should have entitled him to his retirement pay. The Review Board, however, also found that petitioner was not permanently disabled when released from service and held the Retiring Board in error in so finding. Petitioner's suit in the Court of Claims in 1961 attacked the latter finding as arbitrary and capricious as well as unlawful. If petitioners suit was not timely in the Court of

Claims what redress did he have? Apparently none if the decision of the Court of Claims is correct. Could Congress have intended such an unreasonable result in allowing 15 years for review by the review boards?

4. There is likewise an urgent need for this Court to review this case to discourage the military departments from taking similar action in the future in the many disability cases they review. A recurrence of the anomalous result of this case should be prevented. Here the Review Board in 1960, after agreeing with petitioner's attack on the one finding in 1945 that prevented him from receiving his retirement pay, then held that he was not permanently disabled when released. This amounted to a finding in 1960 that he had been erroneously discharged in 1945. However, when petitioner sought redress for his erroneous discharge in the form of active duty pay, the Secretary denied his appeal to Board for Correction of Military Records. Relying on three decisions of the Court of Claims holding that an officer erroneously discharged or released from active service was entitled to active duty pay (*Appell* v. *United States*, 130 Ct. Cl. 671; *Boruski* v. *United States*, 140 Ct. Cl. 1; and *Egan* v. *United States*, 141 Ct. Cl. 1), petitioner sought active duty pay in Court of Claims. While apparently agreeing that there was an erroneous discharge, the Court's reasons for denying recovery, in the opinion of petitioner, set a dangerous precedent concerning the rights of reserve officers on active duty.

The Court held firstly that the petitioner should have objected to being released and sought to stay in the Army, otherwise he waived any invalidity in the release. Although the petitioner actually did object to being released and sought to stay in the service, if

even on limited service, (petitioner sought to show this by amendment), the government should be equitably estopped to require such an objection to being released when at the time of his release it misrepresented to him that he was permanently physically disabled and incapacitated for active duty.

The Court also held that plaintiff as a National Guard officer had no vested right to remain on active duty and could be released at the will of the authorities for many reasons. While this is true, a National Guard officer does have a vested right in remaining on active duty until *lawfully* released. The mere fact that he could have been released for other reasons does not change the fact that he was not released for other reasons. The *Appell, Boruski* and *Egan* cases so held.

The Court's final reason for denying active pay was that plaintiff's release came too close to the end of World War II to speculate that unlike millions of other reservists he would have been kept on active duty. The Court held that petitioner failed to allege or show that he would have been retained on duty for a material period if the Retiring Board had found that, though he suffered from hypertension he was not fully incapacitated for active service. In the opinion of petitioner this places an unfair burden upon the petitioner who should be entitled to rely on the normal evidentiary presumption that a condition or status once shown is presumed to continue until its termination is shown by other evidence. The government should have the burden of showing that the petitioner would not have been retained on active duty and the Court of Claims was unjustified in speculating that he would have been released.

In any event for the Court upon its own motion to dismiss petitioner's claim for active duty on grounds not briefed or argued by the government and to refuse to allow an amendment to make the allegations it felt were the touchstone of recovery, was an abuse of its discretion in allowing amendments under Rule 18 of its Rules.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 374-61

(Decided November 15, 1963)

ARCHIE E. MERRIOTT v. THE UNITED STATES

John J. Pyne for the plaintiff. *Frost & Towers* of counsel.

Katherine H. Johnson, with whom was *Assistant Attorney General John W. Douglas*, for the defendant.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS THE PETITION

PER CURIAM: In August 1944, plaintiff, then a reserve officer on active service in the Army, appeared before an Army Retiring Board which found that he was permanently incapacitated for active duty (because of moderate arterial hypertension) but also found that this disability originated prior to his service. These findings were approved by the Secretary of the Army in October 1944 and plaintiff was released on January 1, 1945, by reason of this physical disability, without disability retirement pay. On December 28, 1959, he applied to the Army Disability Review Board for review of the Retiring Board's determination. In October 1960, the Review Board reversed the Retiring Board's finding that plaintiff was incapacitated for active service, but naturally granted him no relief since it found him not to have been disabled. On November 25, 1960, plaintiff then applied for relief to the Army Board for Correction of Military Records; this was denied (with-

out a hearing) in June 1961. The present suit was begun in September 1961. Defendant moves to dismiss the petition on the ground that the claim is barred by the six-year statute of limitations.

Insofar as plaintiff seeks disability retirement pay, his claim is undoubtedly time-barred. The Retiring Board rejected his claim finally, and the Secretary approved that decision, in October 1944. Accordingly, the six-year statute began to run when plaintiff was released from service (without retirement pay) on January 1, 1945. *Lipp* v. *United States*, Ct. Cl., No. 384-58, decided April 4, 1962, 301 F. 2d 674, *cert. denied*, 373 U.S. 932 (1963); *Friedman* v. *United States*, Ct. Cl., No. 377-60, decided Nov. 7, 1962, 310 F. 2d 381, *cert. denied*, 373 U.S. 932 (1963); *Braun* v. *United States*, Ct. Cl., No. 68-62, decided Oct. 11, 1963. As these decisions show, the proceedings before the Disability Review Board and the Correction Board did not toll the statute or create a new claim. The holding by the Disability Review Board that plaintiff was not incapacitated for service when he was released (reversing the Retiring Board's finding that he was) did not establish a new cause of action or indicate that the prior Board action was other than final. The Review Board simply affirmed and agreed with the final Retiring Board decision, though on a somewhat different ground; no relief was granted to plaintiff and there was no change in his status with respect to disability retirement pay. The Review Board decision was not a "reopening" of the matter within the meaning of the *Friedman* case, *supra*, slip op., p. 21 (see p. 13), 310 F. 2d at 396 (see p. 391). Nor did the holding of a hearing by the Review Board amount to such a "reopening." See *Robinson* v. *United States*, Ct. Cl., No. 433-59, decided this day. The statute of limitations on any claim for disability retirement pay continued to run, without interruption, from January 1, 1945. That claim was long since barred when suit was begun in 1961.

Plaintiff has also presented an alternative cause of action. He says that, if the Retiring Board erred (as the Review Board ruled) in holding him incapacitated in 1944—1945, he was erroneously and unlawfully relieved from active service at the beginning of 1945 on the ground of such incapacity. The result, he asserts, was that he continued actively in the Army and has never been validly released. He asks, therefore, for active duty pay and allowances from January 1, 1945, to the present. We hold this secondary cause of action to be wholly without merit on the face of the petition. There is no allegation or showing that, at or about the time of his release, plaintiff objected to being released or sought to remain in the Army. Without some such timely objection, or other special circumstances not alleged here, he must be considered to have accepted the release and waived any invalidity. Moreover, plaintiff was a National Guard officer who served on active duty at the will of the authorities; subject to release for many reasons and at many times, plaintiff had no vested right to remain on active duty. His release came in 1945 toward the close of World War II. There is no reason to believe, and plaintiff alleges or offers nothing to show, that he would have been retained on duty for any material period if the Retiring Board had determined that, though he suffered from hypertension, he was not fully incapacitated for active service. His release came too close to the end of World War II for the court to speculate that, unlike millions of other reservists, he would have been kept on active duty. The three decisions cited by plaintiff in support of his position (*Appell* v. *United States*, 130 Ct. Cl. 671, 676-77, 690 (1955); *Boruski* v. *United States*, 140 Ct. Cl. 1, 155 F. Supp. 320 (1957); *Egan* v. *United States*, 141 Ct. Cl. 1, 158 F. Supp. 377 (1958)) do not govern this case. In each of those cases the court found that there was very good reason to believe that the officer would have been retained if the authorities had recognized, at the time of his separation, the invalidity of separating him on the ground

that was actually taken. In *Appell*, the separation occurred in October 1941 on the basis of a resignation which the officer tried to withdraw in due time; the court said that it felt "fairly certain" that if the withdrawal of the resignation had been recognized, as it should have been, some useful place would have been found for the plaintiff in the fall of 1941 (130 Ct. Cl. at 676) and that it was "a practical certainty" that the plaintiff would have been continued in the service after this country entered World War II (id. at 690). *Boruski* involved a regular Air Force officer improperly dismissed after an erroneous conviction for manslaughter; he would clearly not have been separated if the error in the court-martial had been corrected before his dismissal. In *Egan*, the officer was illegally and erroneously released to inactive duty in October 1943, and then illegally discharged from the Marine Corps Reserve in April 1944, on the ground that he was insane (which he was not); if the true facts had been known it would have been highly unlikely that a healthy Marine Corps combat officer would have been released in the very midst of World War II; in fact, no reason for such a release at that time appeared in the record (141 Ct. Cl. at 18, 158 F. Supp. at 388). Plaintiff's case, as we have pointed out, is quite different.

Defendant's motion to dismiss the petition is granted and the petition is dismissed.

APPENDIX B

10 U.S.C. § 1552, reading in pertinent part:

"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. . . . Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. . . .

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. . . .

* * * *"

APPENDIX C

10 U.S.C. § 1554, reading in pertinent part:

"(a) The Secretary of each military department, and with respect to the Coast Guard, the Secretary of the Treasury, shall establish from time to time, boards of review composed of five officers, two of whom shall be selected from the Medical Corps of the Army, from the Bureau of Medicine and Surgery of the Navy, from officers of the Air Force designated as medical officers, or from the Public Health Service. Each board shall review, at the request of any officer retired or released from active duty, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available records of the military department concerned, or the Coast Guard, relating to the officer, and such other evidence as may be presented by him. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board in person or by counsel.

(b) Each board of review shall have the same powers as are exercised by, or vested in, the board whose findings and decision are being reviewed. The findings of each board of review shall be transmitted to the Secretary concerned and shall be laid by him before the President for his approval or disapproval and orders in the case.

(c) No review is authorized under this section unless application therefor is filed within fifteen years after whichever last occurred: (1) the date of retirement or release for disability sought to be reviewed, or (2) June 22, 1944.

. . . ."

APPENDIX D

Rule 18 of the Court of Claims rules provides in pertinent part:

"(a) Amendments: A party may amend his pleading once as a matter of course at any time before the service on him of a responsive pleading or of a motion to dismiss or for summary judgment, or, if the pleading is one to which no responsive pleading is permitted, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading (1) by leave of Court (which shall be freely given when justice so requires); (2) by written consent of the adverse party; (3) by stipulation in pretrial conference; or (4) by leave of the Commissioner during or after trial. In any event the amendment shall conform to the requirements of subdivision (e) of this rule. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 30 days after service of the amended pleading, whichever period may be the longer, unless the Court otherwise orders." * * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 290

ARCHIE E. MERRIOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A) is not yet reported.

JURISDICTION

The opinion of the Court of Claims was entered on November 15, 1963. The order of the Court of Claims denying petitioner's motion for rehearing and for leave to file an amended petition was entered on April 17, 1964. The petition for a writ of certiorari was filed on July 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims properly dismissed petitioner's alternative claims for disability retirement pay and for active duty pay from the date of his release from military service.

STATUTE INVOLVED

28 U.S.C. 2501 provides in pertinent part that:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, within six years after such claim first accrues.

STATEMENT

In September 1940, petitioner entered on extended active duty with the rank of Second Lieutenant in the National Guard of the United States. Pursuant to a subsequent finding of an Army Retiring Board that he was physically incapacitated, petitioner was released from active duty effective January 1, 1945. The Retiring Board, after a hearing, denied petitioner's claim for disability retirement pay on the ground that his physical incapacity antedated his entrance on active service, and the Board's findings were approved by the Secretary of War on October 19, 1944.

On December 28, 1959, more than fourteen years after his release from active duty, petitioner filed with the Army Disability Review Board an application for review of the Army Retiring Board's findings. After a hearing, the Review Board affirmed the Retiring

Board's decision that petitioner was not entitled to disability retirement pay, but did so on the ground that petitioner was not incapacitated for active service at the time of his release. Petitioner thereupon applied to the Army Board for Correction of Military Records for correction of his records to show either (1) that he was entitled to disability retirement pay from his release on January 1, 1945, or (2) that he was entitled to active duty pay from that date. He contended that if, as the Review Board determined, he was not incapacitated on the date of his release, his discharge was erroneous and he should be entitled to active duty pay. This application was denied.

On September 20, 1961, petitioner filed his petition in the Court of Claims. He maintained that he was entitled either (1) to disability retirement pay on the basis of the Review Board's finding that his disability did not predate his entry on active service, or (2) to active duty pay on the basis of the Review Board's finding that he was not permanently incapacitated on the date of his discharge.

On the government's motion, the Court of Claims dismissed the petition. It held that the claim for disability retirement pay was barred by the six-year statute of limitations, 28 U.S.C. 2501. It further held that the alternative claim for active duty pay should be dismissed because (1) petitioner failed to allege or show that he objected to his discharge in 1945 so that he must be considered to have waived any invalidity; (2) petitioner's service as a National Guard officer was at the will of the government with

no vested right to remain on active duty; and (3) there was no reason to believe that petitioner, whose release occurred toward the close of the war, would have been retained on active duty unlike millions of other reservists.

ARGUMENT

In dismissing petitioner's action the Court of Claims correctly applied settled principles of law which it had recently announced in an authoritative decision. Its ruling does not conflict with decisions of any other court. Accordingly, no question is presented meriting review by this Court.

1. Petitioner's allegation (Pet. 7-8) of a conflict between the Court of Claims' holding that his demand for disability retirement pay was time-barred and its decision in *Friedman* v. *United States*, 310 F. 2d 381, certiorari denied, 373 U.S. 932, is entirely without merit. In *Friedman*, the Court of Claims said (310 F. 2d at 390):

> [W]here a proper board has acted *finally* the running of the statute is not tolled by later considerations by other boards or agencies. In particular, where full action by a Retiring Board has been had (or refused), later review by the Disability Review Board or the Correction Board does not toll the statute. [Citations omitted.] These cases hold that the *final* action of the first proper board to act (finally) is decisive for limitations purposes.

Despite this explicit language, petitioner urges that the Retiring Board decision in 1944 was not "final"

within the meaning of *Friedman* because it was subject to review by the Review Board in 1959. However, the plain words of the *Friedman* opinion—that "full action by a Retiring Board" and "later review by the Disability Review Board or the Correction Board" does not toll the statute—dispose of this contention.

2. Similarly, without substance is petitioner's assertion that Congress, by permitting an officer discharged for disability to seek review before a military Review Board within 15 years of his discharge (10 U.S.C. 1554(c)),* intended to permit an action to be brought in the Court of Claims within six years of the Review Board's decision. This argument was squarely and properly rejected by the Court of Claims in *Friedman* and in *Odell* v. *United States*, 135 F. Supp. 539. For the claim for disability retirement pay "first accrues" (28 U.S.C. 2501) when the demand is denied by final action of the first proper administrative board to act. Once a claim for disability retirement pay is denied in this manner, it becomes judicially reviewable. *Duff* v. *United States*, 133 Ct. Cl. 161, 135 F. Supp. 527. While the right to further administrative consideration may be available, it is not necessary to seek it in order to obtain judicial review. *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A.D.C.); *Lipp* v. *United States*, 301 F. 2d 674 (Ct. Cl.), certiorari denied, 373 U.S. 932. It is most consistent with this statutory scheme to read Congress' intention as providing *either* judicial review

* Amended in 1962 and now contained in 10 U.S.C. (Supp. IV) 1554(a).

within six years of the final action of the Retiring Board *or* administrative reconsideration within 15 years of that action. It is hardly likely, on the other hand, that Congress intended to enlarge the period for judicial review to 21 years from the date of the Retiring Board's decision by interposing the 15-year limitations period for administrative reconsideration.

3. The Court of Claims correctly rejected petitioner's alternative claim for active duty pay. Considering the nature of his illness—whether or not it amounted to physical incapacity—and the time of his discharge, it is highly unlikely that he would have been retained on active duty. It was proper for the court to consider these factors, in addition to petitioner's failure to allege or show that he had sought to remain in active service, in deciding whether petitioner would have been entitled to his requested relief if his factual allegations were true.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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